

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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DAVE AND KATHY SCHARLER, AND
MICHAEL SCHARLER,

Appellant,

VS.

WHITEHALL SCHOOL DISTRICT
BOARD OF TRUSTEES,

Respondents.

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OSPI 239-94

DECISION AND ORDER

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Dave and Kathy Scharler appealed Jefferson County Superintendent Sandra Streib's dismissal of their appeal of the Whitehall High School District Trustees' decision to expel Michael Scharler. The County Superintendent held she lacked jurisdiction because the appeal was filed more than 30 days after the Trustees' decision.

The Scharlers received written notice of the expulsion hearing on August 10, 1993, and were present for a portion of the hearing. The record does not show whether they attended the entire hearing but the choice to remain or leave was theirs. Michael Scharler was expelled following the hearing August 28, 1993. The District did not issue a written decision.

The County Superintendent received the Scharlers' appeal on March 16, 1994, and dismissed it March 18, 1994. On April 20, 1994, the Scharlers appealed to this Superintendent. The Scharlers

were pro se and the Trustees were represented by counsel. The Trustees submitted an affidavit setting forth procedural facts as part of their answer brief. The Trustees moved to strike the Scharlers' reply brief or, alternatively, for leave to file another brief because the reply brief raised issues not raised in the initial brief. The motion is denied.

STANDARD OF REVIEW

The County Superintendent's decision to dismiss the appeal is a conclusion of law. On review of orders dismissing appeals, this Superintendent uses the standard that motions to dismiss are viewed with disfavor and are considered from the perspective most favorable to the opposing party. Buttrell v. McBride Land and Livestock, 553 P.2d 407, 170 Mont. 296 (1976).

DECISION AND ORDER

The County Superintendent correctly concluded that the time for appealing the Trustees' decision ran before the appeal was filed. The order dismissing is AFFIRMED.

MEMORANDUM OPINION

The ultimate issue in this case is moot. The Scharlers' brief states that after their son was expelled he enrolled in, and graduated from, another public high school. If the County Superintendent or this Superintendent had reached the merits of the Scharlers' appeal, the extent of the remedy that either office could have ordered would be the opportunity to attend public school. Michael Scharler did, in fact, attend public school in 1993-94. He did not suffer the loss of any rights as a result of

the dismissal of the appeal in this case.

As a matter of law that dismissal was correct. The affidavit of procedural facts establishes, and the Scharlers' do not dispute, that the Whitehall School District Trustees gave them written notice of the expulsion hearing and gave them an opportunity to present their position to the Board. The minutes of the Trustees August 28, 1993 meeting, show that a roll call vote was taken in an open meeting. The Scharlers' actions, enrolling their son in another public school, also shows that they had actual notice of the trustees' decision.

Their argument is that the Trustees had to give them written notice of the decision to expel their son. They argue that they had 30 days from the date they received a copy of the minutes of the Trustees meeting to file an appeal.

A written decision is not always a prerequisite to filing an appeal. ARM 10.6.103(2), which governs appeals to the county superintendent states:

A school controversy contested case shall be commenced by filing a notice of appeal with the county superintendent and the parties within 30 days after the final decision of the governing authority of the school district is made. Notice of appeal shall be served by certified mail.

While it would have been preferable to have issued a written decision, the Trustees' decision was final August 28, 1993, and the Scharlers had actual knowledge of that decision.

Because Michael Scharler was not deprived of his constitutional right to receive a public education there is no need to address Due Process issues.

DATED this 28 day of February, 1995.

Nancy Keenan
NANCY KEENAN

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 7th day of March, 1995, a true and exact copy of the foregoing Order was mailed, postage prepaid, to the following:

Jeffrey M. Hindoien
ERDMANN LAW OFFICE
PO Box 5418
Helena, MT 59604

Dave and Kathy Scharler
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Cardwell, MT 59721

Pat Reichert
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